No. 787

In the Supreme Court of the United States

OCTOBER TERM, 1944

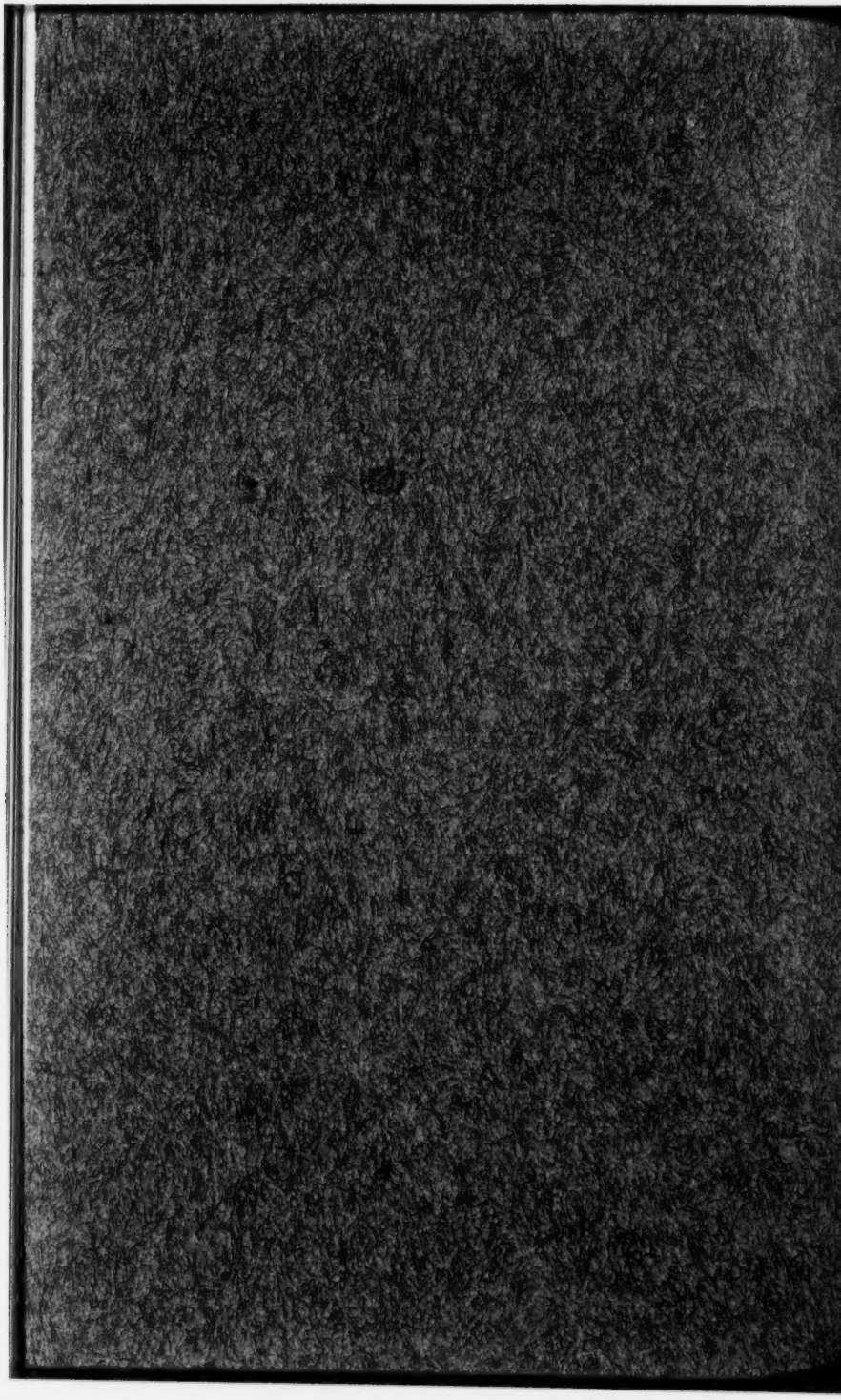
EDWARD LOEW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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CITATIONS

627236—45

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The opinion of the circuit court of appeals (R. 256–258) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 27, 1944 (R. 258). The petition for a writ of certiorari was filed on December 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether evidence which may have indicated that petitioner was guilty of criminal conduct other than that charged in the indictment was properly admitted so that the jury could pass on its bearing on the crime charged.

STATUTES INVOLVED

Section 2811 of the Internal Revenue Code, 26 U. S. C. 2811, provides, in pertinent part, as follows:

> Every person disposing of any substance of the character used in the manufacture of distilled spirits shall, when required by the Commissioner, render a correct return in such form and manner as the Commissioner, with the approval of the Secretary [of the Treasury], may by rules and regulations prescribe, showing the names and addresses of the persons to whom such disposition was made, with such details, as to the quantity so disposed of or other information which the Commissioner may require as to each such disposition, as will enable the Commissioner to determine whether all taxes due with respect to any distilled spirits manufactured from such substances have been paid. Any person who willfully violates any provision hereof, or of any such rules or regulations, and any officer, director, or agent of any such person who knowingly participates in such violation, shall upon conviction be fined not

> more than $500 or be imprisoned for not more than one year, or both. * * *

Section 37 of the Criminal Code, 18 U. S. C. 88, provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner and Henry Davis, Thomas Sharp and Daniel Sharp were indicted in one count, on July 30, 1943, in the District Court for the Southern District of New York. The indictment charged that they and three other persons—Morris, Blenhyme, and Evans, who were named as co-conspirators but not as defendants—conspired to violate Sections 2810, 2811, 2833, and 2834 of the Internal Revenue Code (26 U. S. C. 2810, 2811, 2833, 2834) between January 1, 1941, and continuously thereafter up to the date of the filing of the indictment (R. 6–11).[1] It was charged that, as part of the con-

[1] Section 2810 relates to the registration of distilling apparatus, Section 2833 to carrying on the business of a distiller without giving a bond or with intent to defraud the United States of taxes, and Section 2834 to unauthorized distillation of mash.

spiracy, Davis and the Sharps would fail to register certain stills and distilling apparatus (R. 6–7); that they would carry on the business of distillers without giving bond (R. 7); that they would hire Morris, Blenhyme, and Evans to work at the stills (R. 7); that the conspirators other than petitioner would make and ferment mash fit for distillation in unauthorized premises (R. 8); and that Davis and the Sharps would sell alcohol to various persons (R. 8). The indictment also alleged that the defendants would take steps to prevent disclosure of the conspiracy (R. 8); that petitioner Loew would transport quantities of sugar in behalf of Davis and the Sharps and would fail to render correct returns of his disposition of sugar to the Alcohol Tax Unit as required by Section 2811 of the Internal Revenue Code, *supra,* p. 2 (R. 7–8). Nine overt acts were alleged to have been committed pursuant to the conspiracy between January 1, 1941, and August 1942 (R. 8–11); two of the acts alleged were the sale of sugar by petitioner to the conspirators from April to July 1942, and the filing of returns during those months purporting to show the disposition of sugar sold by him (R. 10–11).

After a jury trial, all the defendants were found guilty (R. 220). Petitioner and Daniel Sharp were sentenced to imprisonment for six months, and the other defendants received sentences of one year and a day (R. 4). Petitioner alone appealed to the Circuit Court of Appeals for the Second Circuit

(R. 5), he was admitted to bail pending appeal (R. 5), and the judgment of conviction was affirmed (R. 258).

Although petitioner does not challenge the sufficiency of the evidence to support his conviction, a brief summary of the proof showing the nature of the conspiracy and petitioner's connection with it may aid the Court in its appraisal of the question presented in the petition:

From February 1941 to August 1942, Davis, the Sharps, and their co-conspirators operated several stills at various locations in New York City (R. 31–35, 39–40, 41–43, 44–45, 51–52, 53–54, 102–104, 115–116, 131–132, 145–147, 149–151). Petitioner conducted a grocery store in New York City (R. 48, 154). In the latter part of April 1942, Davis instructed Blenhyme, one of the co-conspirators, to arrange for the purchase of sugar from petitioner (R. 154). Blenhyme talked with petitioner and arrangements were concluded for petitioner to sell sugar to Blenhyme, but under circumstances which would conceal the illicit nature of the operation. Thus, in ordering sugar thereafter, code was used (R. 154–156), and petitioner delivered the sugar at night (R. 50, 156). In addition, there was testimony that when petitioner delivered sugar to the other defendants and co-conspirators, he would "tell us to hurry up and get the sugar out of the car before the law would run up on him" (R. 50). The deliveries by petitioner continued until some time in July 1942 (R. 159).

An investigator of the Alcohol Tax Unit of the Treasury Department (R. 187) testified that on November 6, 1942, petitioner came into his office and stated that he had sold sugar to bootleggers in the past and that he expected to continue to sell it to bootleggers because there was a very good profit in it; that he was afraid that the OPA "might put him out of business"; that if his records and inventory were examined, no discrepancies would be found; that he "always had someone who would cover him on any sales of sugar which he might make" (R. 193–194).[2] This testimony was admitted by the trial judge over petitioner's objections (R. 193–194),[3] and petitioner's subsequent motion to strike the testimony relating to the sale of sugar to bootleggers on the ground that it might concern matters outside the indictment was also denied (R. 209–210). Petitioner offered no evidence in his defense (R. 208). With respect to the investigator's testimony concerning petitioner's statements to him regarding sales of sugar to bootleggers, the trial judge instructed the jury that these statements were in the nature of an admission by petitioner as to "what he was doing", and, also, evidence of petitioner's knowledge and intent, in the event that the jury found "that he was a con-

[2] Petitioner's visit to the investigator apparently resulted from inquiries by the Alcohol Tax Unit as to his sugar sales (R. 197).

[3] It is doubtful from the record whether petitioner's objections covered the entire admission or merely that concerning the sale of sugar to bootleggers.

spirator with the other three" (R. 217–218). Upon petitioner's exception to this "interpretation" of the investigator's testimony (R. 219), the trial judge responded that he did not intend to "interpret" the testimony, but merely to state his recollection, and that the jury was required to consider its own recollection of the testimony (R. 220).

ARGUMENT

Petitioner contends (Pet. 2, 4, 10) that the testimony of the investigator, *supra*, p. 6, concerned unrelated criminal conduct and thus served to put his character in issue. He contends that this was improper because he did not testify or place his character in question.[4] We have no quarrel with petitioner's abstract statement (Pet. 2, 10) that evidence as to unrelated criminal conduct of an accused is inadmissible under such circumstances. See *Boyd* v. *United States*, 142 U. S. 450, 458; *Tedesco* v. *United States*, 118 F. (2d) 737 (C. C. A. 9); *Eley* v. *United States*, 117 F. (2d) 526, 528 (C. C. A. 6). But germane evidence is, of course, not rendered inadmissible because it may also indicate the commission of other crimes. *Moore* v. *United States*, 150 U. S. 57, 61; *Devoe* v. *United States*, 103 F. (2d) 584, 588 (C. C. A. 8), certiorari

[4] Since petitioner did not testify or put his character in question, the testimony was not admissible to prove his bad character. *Greer* v. *United States*, 245 U. S. 559; *Mackreth* v. *United States*, 103 F. (2d) 495, 496 (C. C. A. 5); *Borum* v. *United States*, 56 F. (2d) 301 (App. D. C.), certiorari denied, 285 U. S. 555.

denied, 308 U. S. 571; *Suhay* v. *United States,* 95 F. (2d) 890, 894 (C. C. A. 10), certiorari denied, 304 U. S. 580; *Dysart* v. *United States,* 270 Fed. 77, 79–80 (C. C. A. 5), certiorari denied, 256 U. S. 694. It is apparent, as held by the court below (R. 257), that it was permissible for the jury to infer that petitioner's statements to the investigator referred to sales which were directly in issue. The indictment alleged (R. 10) that petitioner had made sales of sugar to the other conspirators from April to July 1942, and the Government proved this through the testimony of two of the co-conspirators (R. 48–50, 154–157, 159). Petitioner's admission was made in November 1942 (R. 193), only a few months after the sales in question. Hence there was a substantial probability—enough to go to the jury—that his statement referred to those sales. Furthermore, as pointed out by the court below (R. 257), the jurors might have been instructed to disregard the statement unless they believed it did refer to the sales in issue, but petitioner did not request such an instruction.[5]

[5] Petitioner complains (Pet. 3) that the portion of his statement to the investigator to the effect that he had someone who could "cover him up," was inflammatory. As we have indicated, *supra*, p. 6, footnote 3, it is doubtful whether petitioner's objection was directed to this portion of the investigator's testimony. But, in any event, it can hardly be contended that the testimony was irrelevant, for it was directly connected with an issue in the case, i. e., petitioner's alleged failure to render correct returns of his disposition of sugar (R. 7–8).

CONCLUSION

This case having been correctly decided in accordance with well-settled law, and there being no conflict of decisions, we respectfully submit that the petition for a writ of certiorari should be denied.

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JANUARY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945